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IN THE SUPREME COURT OF
THE UNITED STATES

1982 OCTOBER TERM

GORDON S. MIRKIN

V.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

GORDON S. MIRKIN, PRO SE
4 BUCHANAN ROAD
MARBLEHEAD, MASSACHUSETTS
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QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner satisfy the criteria for granting a new trial on the basis of newly discovered evidence as set forth in United States v. Wright, 625 F.2d 1017 (1st Cir. 1980)?

2. Should the District Court have applied the standard of Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928) and granted a new trial?

3. Can this Court establish more functional guidelines for criteria for granting a new trial on the basis of newly discovered evidence to afford petitioners the right to due process under the Fifth Amendment of the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GORDON S. MIRKIN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, GORDON S. MIRKIN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the case of United States v. Mirkin, decided on May 24,1982.

CITATIONS TO OPINION BELOW

The first opinion of the First Circuit Court of Appeals is reported at 649 F.2d 78

(1981). The second opinion of the First Circuit Court of Appeals is reported at 678 F.2d (1982). The opinion of the District Court for Massachusetts is not reported.

JURISDICTION

The indictment against the petitioner was brought under 26 U.S.C. § 7201. The second opinion of the First Circuit Court of Appeals was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and the Rules of this Court.

STATEMENT OF THE CASE

Petitioner was indicted on February 14,1980 on three counts of income tax evasion, in violation of 26 U.S.C. §7201. The indictment alleged that the petitioner had evaded taxes by willfully understating his income for 1972, 1973 and 1974. At the trial the government relied upon Gerald Meiselman, the accountant who had prepared petitioner's tax returns to prove willful evasion. Meiselman testified that he recalled that the petitioner had instructed him not to attribute certain bank deposits to income. The petitioner contradicted Meiselman's testimony and testified he had made full disclosure to Meiselman, that the deposits were a matter of record at his bank and he had relied on Meiselman to prepare accurate and complete returns.

The trial became a question of credibility-was the jury to believe petitioner or Meiselman? The trial judge focused his charge directly on this issue, calling it "the critical question" for the jury. The jury resolved the question in favor of Meiselman's credibility, convicting

the petitioner, on all three counts. In denying petitioner's earlier motion for new trial, the trial judge again characterized the key issue as credibility of petitioner or Meiselman/ See United States v. Mirkin, 649 F.2d 78,81 (1st Cir. 1981).

Approximately three months after he testified, Meiselman was examined by Herbert Rothfarb, Ph.D. for disability insurance purposes and was found "(c)learly . . . no longer able to function as a CPA", suffered from "striking" memory problems, inability to "reason clearly or interpret facts", a loss of "approximately 25 to 30 IQ points", slowed-down ability to calculate, to retain, to recall, and to maintain a sustained effort", "difficulty in storing information","difficulty performing adequitely at a high school level". At the same time he denys memory damage, "insists that he can perform as before, i.e. as a competent person", yet he can be "friendly and cooperative . . . talkative and quite verbal"."His memory results seem artificially elevated . . . however, it is clear he cannot reason clearly or integrate facts", and

"in short, he has lost a great deal of his intelligence,(and) memory"; he remains "embittered . . . obsessional . . . egocentric . . .schizoid and sociopathic". Petitioner's second motion for a new trial was principally based on Dr. Rothfarb's extensive psychological report of Meiselman's condition, which showed that Meiselman's claim during cross-examination at the trial that his memory was not damaged by the auto accident of 1975 was absolutely untrue. Furthermore, Meiselman's apparent ability to fool himself and the untrained or uninformed observer as to his damaged memory would make it unusually difficult for a judge or jury to go behind his friendly, highly verbal exterior to find the defective memory,without having the advance knowledge of his problem. Of course,with that advance knowledge Meiselman could be evaluated as to credibility by the court.

The District Court, however, denied the motion without a hearing and the First Circuit Court of Appeals upheld the opinion of the District Court in a Per Curium decision.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S MOTION FOR NEW TRIAL SATISFIED THE CRITERIA FOR GRANTING A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE OF THE CONCEALED DAMAGED MEMORY OF THE CHIEF GOVERNMENT WITNESS. FAILURE OF FEDERAL TRIAL COURT TO APPLY SUCH CRITERIA CONSTITUTIONALLY REQUIRES REVERSAL.

The petitioner's motion for a new trial was based on the discovery after the trial that the chief government witness, Gerald Meiselman, had concealed the severe damage to his memory, based on the discovery of a report of Herbert Rothfarb, Ph.D. prepared independently for disability insurance purposes. During the doctor's examination, Meiselman was "friendly, cooperative . . . talkative and quite verbal". See Appendix " ". During the course of the trial, Meiselman presented the same attributes, thereby concealing the damage to his memory to a degree that it was not discovered by the judge, jury, or counsel for government or defense.

The severity of the damage to the chief witness of the government was sufficiently severe to warrant petitioner's motion for a new trial. The petitioner's motion satisfied the criteria for granting a new trial on the basis of newly discovered evidence as set forth in United States v. Wright, 623 F.2d 1017, 1019 (1st Cir. 1980):

> A motion for new trial on the basis of newly discovered evidence will ordinarily not be granted unless the moving party can demonstrate that: (1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon the retrial of the defendant. See Pelegrina v. United States, 601 F.2d 18, 20-21 (1st Cir. 1979); In re United States, 565 F.2d

173, 177 (1st Cir. 1977); John v. United States, 32 F. 2d 127, 129 (8th Cir. 1929); C. Wright & A. Miller, Federal Practice and Procedure § 557 at 515 (1969).

The District Judge denied the petitioner's motion on the ground that it failed to meet any of these four criteria. That decision was manifestly erroneous as the motion did, in fact, satisfy all of the Wright criteria.

A. "The evidence was unknown or unavailable to the defendant at the time of trial."

The evidence in question, the report of Dr. Rothfarb, was not even in existence at the time of trial. His examination did not commence until some three months after Meiselman had testified. His report was not completed until approximately six months after the trial, and was not received by the petitioner's appellate counsel until almost a year after the trial. By its very nature, the report itself must be considered to be "newly discovered" since it was not in existence or capable of discovery at the time of trial. Furthermore, the chief government

witness, Meiselman, actually concealed his lack of effective memory and actively denied under cross-examination that he had this defect. The truth of the inability of Meiselman to meet the basic capacity of memory needed to be a competent witness never would have come to light, but for Dr. Rothfarb's report after the trial.

If the issue in the instant case had been whether a traffic light had been red or green at a particular time and Meiselman had testified that his memory was that the light had been red and later a doctor had examined him and found him to be color-blind; the court would have to reopen the case because if would be unable to rely on the testimony of a color-blind person as to color, if color were the issue in the case. Here the situation is that Meiselman's testimony on the issue in the case was based on a memory that was damaged and unreliable, but that defect was not only unseen by the court and the jury but, according to Dr. Rothfarb, Meiselman himself was not consciously aware of it at the time of the trial. Therefore, the District Court

erred in holding implicitly that the evidence was not "newly discovered". C.f. United States v. Glickman, 604 F.2d 625, 632-3 (9th Cir. 1979) (Post-trial psychiatric reports newly discovered evidence but insufficient to warrant new trial.)

B. "Failure to learn of the evidence was not due to lack of diligence by the defendant."

The facts underlying Dr. Rothfarb's post-trial report certainly existed at the time of trial. However, neither the defense nor the Government was aware of the extent of Meiselman's disability at the time of his testimony. The defense asked Meiselman on cross-examination whether the accident had impaired his memory. Meiselman responded that it had not.

Similarly, in United States v. Atkinson, 429 F. Supp. 880 (E.D.N.C. 1977), a critical government witness falsely denied prior convictions on cross-examination. Post-trial discovery of his record was held to be newly discovered evidence warranting a new trial without any mention of counsel's diligence.

This is not a case, as previously stated, of the k..owing and intentional use of perjured testimony by the prosecution. Rather, it is a case, in which evidence newly discovered, after trial, previously unknown to the prosecution and the defense, reveals that the government witness Pennington, whose credibility was essential to sustain petitioner's conviction, testified falsely in denying prior criminal convictions. Rule 33, Federal Rules of Criminal Procedure, provides: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice . . ." Where, as in this case, the Government's case must stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. Gordon v. U.S., 343 U.S. 414, 417, 73 S.Ct. 369, 372, 97 L.Ed 447 (1953). Id. at 844.

Defense counsel in the instant case may have been suspicious of some memory damage resulting

from the accident, just as Atkinson's defense counsel may have suspected a stronger motive for the witness's testimony. However, once the witness denied the matter, counsel could do no more. There was plainly no lack of diligence in either case. Cf. United States v. Dean, 647 F.2d 779, 782-5 (8th Cir. 1981) (While condemning defense counsel's delay in not bringing rumors of juror bias to the attention of the court during trial, Court of Appeals noted that he had no direct proof until after the verdict, and reversed denial of the motion for a new trial.)

Also, if the government had been aware that Meiselman's memory had been damaged, it had an affirmative dury to correct his false denial. C.f. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). It may also have had a duty to disclose this knowledge to the defense as exculpatory evidence. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976). Meiselman's concealment was the cause of the non-disclosure, not lack of diligence by the petitioner.

By the term "concealment" the petitioner does not mean to impart intent on the part of the witness to mislead the court. However, due to the unusual nature of the damage to the head of the witness and to his memory, it is not apparent that he has the difficulty unless one had the opportunity to verify the "alleged facts"stated by the witness from his faulty memory with reality, in order to find that the witness was not telling the truth, even though the words were spoken with great conviction and in a "friendly, talkative... quite verbal" manner, according to Dr. Rothfarb. In point of fact, Dr. Rothfarb indicates emphatically that Meiselman has completely convinced himself that his memory is intact and accurate.

By refusing to question Dr. Rothfarb, to order an examination of Meiselman, or even to conduct a hearing on the issue the District Court Judge implies that he is still convinced of the credibility of the testimony of the witness, including his memory; despite any degree of diligence on the part of petitioner's counsel.

C. "The evidence is material and not merely cumulative or impeaching."

As noted above, Meiselman's testimony formed the very heart of the Government's case against the petitioner. His testimony, based on his memory, was that the petitioner had instructed him not to attribute some deposits to income was not corroborated by other evidence and was contradicted by the petitioner's own testimony. However, Meiselman's credibility was not otherwise attacked.

It is difficult to imagine evidence more material in these circumstances than Dr. Rothfarb's impartial findings as to Meiselman's incapacity. The findings raise questions as to whether Meiselman should have been allowed to testify at all. As the Court of Appeals noted in United States v. Benn, 476 F.2d 1127 (D.C. Cir. 1973), the competency of brain damaged or retarded witnesses presents a particularly difficult problem for both the judge and the jury, in which psychiatric examinations may be of assistance.

The competency of the witness to

testify before the jury is a threshold question of law committed to the trial court's discretion. It remains for the jury, of course, to assess the credibility of the witness and the weight to be given her testimony. Competency depends upon the witness' capacity to observe, remember,and narrate as well as an understanding of the duty to tell the truth. It also requires an assessment of the potential prejudicial effects of allowing the jury to hear the testimony. Mental retardation may be so severe, capabilities so impaired, and the testimony so potentially prejudicial that it should be barred completely by the judge. Or there may be sufficient indications of a witness' capacity and of the reliability of her testimony that it should be heard and assessed by the jury, albeit with a cautionary instruction. . . .

The dangers which must be consid-

ered in determining whether a mentally retarded (witness) is a competent witness must also be considered by the jury in assessing her credibility, particularly since "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." The jury may be aided in its task by the results of a psychiatric examination, even when such an examination is not necessary to the judge's determination of competency. When an examination should be ordered to aid the jury is also a judgment, involving a balancing of need against dangers, which is committed to the discretion of the trial judge. Here, the strong indications of reliability of the (witness') testimony weigh heavily against the need for an examination. Also, the jury was not left to make its credibility decision without information as to the witness' defect;

it had the frank and comprehensive testimony of the girl's father to assist it. In these circumstances, we cannot say that the trial judge erred in failing to order a psychiatric examination of the witness to aid the jury. Id.at 1130-1 (footnotes omitted).

Here, in contrast, neither the judge nor the jury was afforded the opportunity at the petitioner's trial to consider the impact of Meiselman's disability on his ability to remember or to testify truthfully.

Nor can the evidence be said to be cumulative or merely impeaching. In Amos v. United States, 218 F. 2d 44 (D.C. Cir. 1954), the defendant moved for a new trial based upon the testimony of a previously unavailable witness who would have supported the defendant's trial testimony that he had acted in self-defense. The Circuit Court reversed the denial of his motion for a new trial.

We think a new trial should have been granted. We have held that newly

discovered evidence which is merely cumulative does not require a new trial. Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652. But that principle should not be applied where, as here, a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself.

The same analysis applies here. Dr. Rothfarb was a disinterested witness whose testimony was of vital importance to the defense and was not available at trial.

The credibility of the chief witness had not been seriously attacked during the trial because the damage to his brain was not apparent as has been noted previously. Therefore an attack on the witnesses credibility in the motion for a new trial would be fresh and most damaging to the entire foundation of the government case and not merely an "additional part of a cumulative attack on a witnesses's

credibility". See United States v. Gilbert, 668 F.2d 94 (2nd Cir. 1981).

Accordingly, the District Court erred in holding that the evidence was not material.

D. "It will probably result in an acquittal upon retrial of the defendant."

As noted in the previous section, Dr. Rothfarb's findings might have led a trial judge to disqualify Meiselman as a witness. United States v. Benn, supra. If Meiselman were disqualified as a witness, the Government would have no proof whatsoever that the petitioner had willfully attempted to evade his income taxes in the years 1972, 1973 and 1974. Exclusion of the testimony of the chief government witness, Meiselman, would surely have led to the acquittal of the petitioner. Inclusion of Meiselman's testimony along with the doctor's would greatly shift the weight of credible evidence to favor the petitioner. It may be useful

to compare Zeigler v. Callahan, __F.2d__ (1st Cir. 1981) (No. 81-1015, September 22, 1981; with Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) as both are concerned with the likely impact of psychiatric evidence on the jury. In Chavis, as in the instant case, the report concerned the veracity of the government's principal witness. The Fourth Circuit found a due process violation in the non-disclosure and reversed.

> We do not doubt that Hall's psychiatric report if it had been made available to defense counsel might have had a substantial impact on the outcome of the case. If the jury had known that Hall lacked the ability to recall accurately events, about which he testified with such exquisite detail, that had occurred at least one and one-half years prior to the time that he was testifying. That Hall possessed limited intelligence was a fact which the jury could properly have known for its effect on his credibility. See

United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 469 (4th Cir. 1980). Nor do we doubt that his statement in the report that he did not participate, although present on the scene, in the burning of the store when he testified to the contrary at trial would surely shake his credibility. Id. at 224.

In Zeigler, however, unlike the instant case and unlike Chavis, the Government's case did not stand or fall on Lincoln's credibility and thus the psychiatric report did not create a reasonable doubt which did not otherwise exist. Zeigler, supra, __ F.2d at __ (Slip Op. at 26).

It must be emphasized that Dr. Rothfarb's testimony would go directly to the truth and veracity of Meiselman and the accuracy of his memory. Even if it is viewed in this light as "merely impeaching", it is so vital to the truth finding function of the jury as to mandate a new trial.

It is generally within the sound

discretion of the trial court to grant or deny a new trial on the ground of alleged newly discovered evidence which is merely cumulative or impeaching. United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir. 1976); United States v. Cozzetti, 469 F.2d 684 (9th Cir. 1972). Ordinarily, newly discovered evidence affecting a witness's credibility at trial "will not support a motion for a new trial, because new evidence which is'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial". Mesarosh v. United States, 352 U.S. 1, 9, 77 S.Ct. 1, 5, 1 L. Ed. 2d 1, 5 (1956). However, it is within the Court's power to grant a new trial if it appears that, had the impeaching evidence been introduced, it is likely that the jury would have reached a different verdict.

United States v. Davila, 428 F. 2d 465 (9th Cir. 1970); United States v. Lewis, 338 F.2d 137 (6th Cir. 1964); cert. denied, 380 U.S. 978, 85 S.Ct. 1342, 14 L.Ed.2d 272, Winer v. United States, 228 F.2d 944 (6th Cir. 1956), cert. denied, 351 U.S. 906, 76 S.Ct. 695, 100 L.Ed. 1442.

The newly discovered evidence herein is certainly not of a cumulative nature, but it is definitely impeaching. However, under the circumstances of this case, it is impeaching evidence with serious implications regarding the truth and veracity of Rapisardi's testimony, a factor which had to weigh heavily on the minds of the jurors during their deliberation. This Court feels very strongly that the additional piece of impeaching evidence could have been the proverbial "straw that broke the camel's back" with respect to Rapisardi's credibility, which would

have almost assuredly resulted in a different verdict by the jury. Thus it is my firm belief that under the facts of the instant case, the ordinary rule, as espoused in Mesarosh v. United States, supra, for not granting a new trial is inapplicable, and that "the evidence here does not come within the general interdiction that the newly discovered evidence which is merely impeaching is ordinarily insufficient to warrant a new trial". United States v. Gordon, 246 F. Supp. 522 (D.D.C. 1965). United States v. Lipowski, 423 F. Supp. 864, 867 (D.N.J. 1976)

Thus, in the circumstances of the petitioner's case, the district court erred in underestimating the probable effect of the proferred evidence, and in denying the motion for a new trial.

II. The District Court Should Have Applied The Standard of Larrison V. United States, 24 F.2d 82 (7th Cir. 1928) And Granted A New Trial.

As has been demonstrated, Meiselman testified falsely when he denied memory damage. In Larrison v. United States, 24 F. 2d 82, 87 (7th Cir. 1928), a less stringent burden of proof is required where a material witness testifies falsely. The First Circuit had recognized the applicability of the Larrison standard in United States v. Wright, supra, 625 F.2d at 1020.

> In Larrison, the Seventh Circuit stated that when the motion for new trial is based on an allegation that a material witness testified falsely at trial, a new trial should be granted if: (1) the court is "reasonably well satisfied" that the testimony was false, and (2) without the false testimony the jury "might have reached a different conclusion." Id. at 87. Although dicta in at least one of our opinions sugguests that this circuit has not

decided whether to apply the Larrison rule, see In re United States, supra, ., 565 F.2d at 173 n. 3, we have suggested that the rule is applicable in cases in which the new evidence demonstrates that the testimony in question was deliberately false. See Pelegrina v. United States, supra, 601 F. 2d at 21, United States v. Street, 570 F.2d 1, 4 (1st Cir. 1977); United States v. Strauss, 443 F. 2d 986, 989-90 (1st Cir.), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971).

The petitioner concedes that Meiselman's false denial might not have been perjurious per se as his disability presumably prevented him from realizing that he was testifying falsely or from intending to testify falsely. However, the ignorance of the witness that he was testifying falsely should not be fatal to a claim for a new trial where, as here, the testimony was both critical to the government's case and was actually false. C.f. United States

v. Turner, 490 F.Supp. 583, 602-3 (E.D. Mich. 1979) (witness' ignorance of bargain communicated only to counsel was not fatal to motion for a new trial).

Here Meiselman's denial of damage to his memory was actually false; and his other testimony which was based upon his damaged memory at the very least might have been false. Clearly, without his false denial of disability, the jury most assuredly might have reached a different result. Furthermore, if his testimony as to his allegedly exact memory of the petitioner's instructions to him was excluded either as false or as being too unreliable, a different verdict surely would have been reached and the petitioner would not have been incarcerated in the Federal Prison at Lewisburg, Pennsylvania.

Hence, under the Larrison standard, the District Judge erred in denying the motion for a new trial.

III. The Motion For A New Trial Should Be Remanded For An Evidentiary Hearing.

The summary denial of the motion for a new trial makes it difficult for counsel and for the reviewing court to determine why the District Judge denied the motion or whether that decision was appropriate.

Indeed, a hearing would have assisted the trial judge in assessing the materiality and the probable impact of Dr. Rothfarb's testimony on a new jury. United States v. Disston, 582 F.2d 1108, 1112 (7th Cir. 1978); United States v. Rhodes, 556 F.2d 599, 601-2 (1st Cir. 1977).

It has been assumed that Meiselman had no knowledge of his memory defect and testified without harmful intent. However, if the District Court had granted a new trial or at least an evidentiary hearing an entirely new attack on the credibility of the chief government witness would be unavoidable - and it would go to the heart of the characterization of Meiselman,by the government as a witness without a reason for testifying against the

petitioner, except to tell the unbiased "truth".

This unavoidable attack would be required by Dr. Rothfarb's report, in which the doctor analyzes Meiselman and describes him as "embittered . . . obsessional . . . egocentric . . . schizoid and sociopathic".

Accordingly, at a minimum, this impartial and independent report raises questions that require that the case be remanded for an evidentiary hearing on the mental capacity and stability of the chief government witness. To fail to do so, would be to deny the petitioner his right to due process of law, as guaranteed under the Fifth Amendment of the United States Constitution.

By the most elementary consideration of Meiselman's damages capacity to recall, he cannot be presumed competent to testify. See United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982), Fed. Rules Evid., Rule 601.

IV. This Court Must Establish More Clearly Defined Parameters To Guide The District Courts As To What Will Constitute Sufficient Evidence to Satisfy The Requirements Of United States v. Wright, Supra.

In the petitioner's case the chief government witness is shown for the first time to be mentally defective on post-trial examination by an independent doctor. This evidence was rejected by the court without a hearing - raising the issue of whether there is any set of facts that cannot be ignored in a motion for a new trial based upon newly discovered evidence.

CONCLUSION

For all of the above reasons, petitioner, Gordon S. Mirkin, respectfully requests this Court to grant a Writ of Certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1497

UNITED STATES OF AMERICA
Appellee,

v.

GORDON S. MIRKIN,
Defendant, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. W.Arthur Garrity,Jr.,U.S.District Judge)

BEFORE COFFIN, Chief Judge,
BOWNES AND BREYER, Circuit Judge.

Albert F. Cullen, Jr. and Cullen & Wall for appellant.

William F. Weld, United States Attorney, and James F.X. Dinneen, Assistant United States Attorney, on brief for appellee.

May 14, 1982

PER CURIAM. Defendant-appellant appeals from the denial of his second new trial. He requested the new trial on the basis of newly discovered psychologist's report, which revealed that the psychologist questioned the mental capacity of the government's key witness. This evidence is "merely impeaching". United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980). And in view of the fact that, in ruling on appellant's first motion for a new trial, the district court stated that appellant's testimony "was contrary to common sense," and that it had a "low opinion of the credibility of Mr. Mirkin", United States v. Mirkin, 649 F.2d 78, 81 (1st Cir. 1981), we do not think that appellant's new evidence would "probably result in an acquittal upon retrial". United States v. Wright, supra, 625 F.2d at 1019. Either of these grounds was sufficient to justify denying the motion for a new trial. Id.

"In considering such a motion (for a new trial based on newly discovered evidence), the (district) court has broad power to weigh the

evidence and assess the credibility of both the witnesses who testified at trial and those whose testimony constitutes 'new' evidence (citations omitted). Ordinarily we will affirm the trial court's denial of a new trial unless the court has manifestly abused its discretion." Id. There was no such abuse in this case.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1497.

UNITED STATES OF AMERICA,
Appellee,

v.

GORDON S. MIRKIN,
Defendant, Appellant.

JUDGMENT

Entered: May 24, 1982

This cause came on to be submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The order of the District Court is affirmed.

By the Court:

Dana H. Gallup
Clerk.

UNITED STATES OF AMERICA,
Appellee,

v.

GORDON S. MIRKIN,
Defendant-Appellant.

No. 80-1442

United States Court of Appeals
First Circuit.

Argued April 8, 1981.

Decided May 27, 1981.

The United States District Court for the District of Massachusetts, W. Arthur Garrity, Jr., J., denied defendant's motion for new trial bases on allegation of juror misconduct, and defendant appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) district judge did not err in denying motion for recusal, despite judge's statement that he did not believe defendant, and (2) district judge conducted proper investigation on claim of juror misconduct.

Affirmed.

Albert F. Cullen, Jr., Boston, Mass., with whom Cullen & Wall, Boston, Mass., was on brief, for defendant-appellant.

Elliot D. Lobel, Asst. U.S. Atty., Boston, Mass., with whom Edward F. Harrington, U.S. Atty., Boston, Mass., was on brief,for appellee.

Before CAMPBELL, BOWNES andBREYER, Circuit Judges.

BOWNES, Circuit Judge.

This is an appeal by defendant Gordon S. Mirkin from the district court's denial of his motion for a new trial based on an allegation of juror misconduct. There are two issues: whether the trial judge should have recused himself from hearing and deciding the motion,and whether he conducted a proper investigation of the claim of juror misconduct.

A full exposition of the facts relative to the motion for a new trial is necessary. Defendant is a lawyer. After a jury trial on June 10 and 11, 1980, he was gound guilty of three counts of income tax evasion. On June 13

defendant filed a motion for a new trial and a supporting affidavit alleging misconduct by one juror. The affidavit can be summarized as follows: On the day after the trial, Mirkin, his wife, and his lawyer went over the jury list, presumably for the first time, because Mirkin's wife felt that any jurors from the vicinity of Marblehead, Massachusetts, might have known of Mirkin's suspension from the practice of law, which took effect prior to his trial. Upon learning that juror number 10 was Mrs. Anne Doctoroff, Mirkin ascertained that her husband was an attorney, Isadore Doctoroff. He then recalled that he had represented the husband-libelee and Doctoroff had represented the wife-libelant in a divorce case, Foresta v. Foresta, in 1970 and that his relationship with Doctoroff had been "especially acrimonious." On one occasion during the divorce proceedings, defendant telephoned Doctoroff at his home and " was having a heated conversation with him when his wife, Anne Doctoroff, the said juror got on the phome and told me that her husband was not a

young man and not in the best of health and cannot take this business and hung up the telephone." The final paragraph of the affidavit stated that,"(al)though said juror knew me and had in the past expressed animosity toward me, she failed to bring that information to the attention of the court, despite the court's inquiry."

An affidavit was also filed by Joan Cronkhite, she had been named as correspondent in the divorse case. Her affidavit stated that the phone call described by Mirkin was made from her home and that, after Mirkin hung up, she asked what the conversation was all about. He replied "that he had not only talked with Mr. Doctoroff, but also (Doctoroff's) wife and that both were extremely angry about his call and that Mrs. Doctoroff had told him not to bother her husband again."

The district vourt ordered that a hearing on the motion for new trial be held on June 25, ordered all pertinent material impounded, and directed counsel for both parties and defendant to refrain from communicating with the persons

referred to in the affidavits pending a determination of the motion.

The following testimony was elicited at the hearing, which was held over a three-day period. The implicated juror, Mrs. Doctoroff, who was sixty-seven years old and recently discharged from the hospital, stated that she did not remember any telephone call, did not think that she would break in on a telephone call to her husband, and had no knowledge of the defendant prior to the trial.1/

1./ We note that prior to trial, the district court asked the potential jurors whether they knew the defendant, or knew of anything that would prejudice them against him. Mrs. Doctoroff remained silent.

At the time of the hearing, Mr. Doctoroff had been practicing law for over forty-six years and was semi-retired. He testified that he had never done much divorce work. Doctoroff did not recognize the defendant when he was

pointed out to him at the hearing. He testified that his wife did not discuss the defendant's criminal case with him, because of the court's instruction not to do so, and did not tell him the name of the defendant. He did not at first remember the divorce case. When shown a letter of August 18, 1970, bearing his signature and addressed to Mirkin, Doctoroff vaguely recalled that he was counsel initially for the libellant in the divorce action; however, he had no recollection of the grounds for the case or of any details concerning the action. Under questioning by defense counsel, Doctoroff stated that the name of defendant did not mean anything to him, reiterated that he did not remember the telephone call, and denied that it took place. Court records adduced at the hearing showed that he had withdrawn from the case after three months.

Defendant's testimony substantiated and fleshed out his affidavit. He also testified to an acrimonious exchange between himself and Doctoroff prior to a preliminary support hearing

at "the lowest level of the Middlesex Probate Court." Mirkin told of the troubles he had because of the conduct of Doctoroff's client,Mrs. Foresta. According to defendant, Mrs. Foresta went to the office of Dr. Cronkhite, husband of the correspondent, Joan Cronkhite, "and ranted and raved and embarrassed him terrible." He also testified that Mrs. Foresta made telephone calls to Mrs. Cronkhite that upset her and her children. Defendant characterized the divorce case as "wild"and "bizarre" and attributed this to the conduct of Mrs. Foresta. He felt that Doctoroff was remiss in not controlling the behavior of his client. Mirkin was concerned about the effect of Mrs. Foresta's behavior on his client, her husband, who was undergoing treatment for diabetes at the time.

Joan Cronkhite testified that she recommended to Mr. Foresta that defendant represent him in the divorce proceedings his wife had instituted. The rest of her testimony was the same as in her affidavit.

The last witness was Mrs. Foresta. She

testified that Doctoroff had represented her for about three months, after which time he was "fired" because her father did not think he was "strong"enough to handle the case. Mrs. Foresta did not remember making any phone calls to Mrs. Cronkhite and denied going to Dr. Cronkhite's office.

At the conclusion of the hearing, defense counsel moved that the judge recuse himself on the grounds that he had failed to follow the standards set forth in United States v. Doe, 513 F.2d 709, (1st Cir. 1975), and had "already made a prior determination with respect to this motion." This motion for recusal was denied.

Counsel were then given an opportunity to argue the motion for a new trial. After argument was concluded, the court denied the motion for a new trial with a full explication of his reasons. The court stated:

> Coming to the credibility of Mr. Mirkin, I simply do not believe him. In my opinion - and, of course, judgments as to credibility are matters of opinion,

and my opinion can conceivably be incorrect in this respect, and yet the issue here has been framed by his lawyer as one of credibility - in my opinion he sought to convert the coincidence of his having a divorce case in which Mr. Doctoroff was on the other side into a basis for fabricating bias on the part of a juror in his case.

My reference to the case - and incidently, in forming my opinion as to the credibility of Mr. Mirkin. I do attach some significance to the jury's having rejected testimony which he gave during the trial, which in my opinion - and again, it is just a question of opinion - was contrary to common sense and contrary to the credible testimony of the person, a certified public accountant, to whom he sought to point the finger, or on whom he sought to pin the blame for his substantial evasions of federal income tax.

So that it is true that the jury did disbelieve Mr. Mirkin when he testified at the trial. That was the issue that was presented to the jury by counsel in the case. Whom do you believe, Meiselman or Mirkin? So that the jury's verdict, which I might say, coincided with the Court's appraisal of the respective credibility of Mr. Mirkin and Mr. Meiselman, has been a factor, although not a major factor, in the Court's discounting the believability of Mr. Mirkin, who is, in my view, making a last-ditch effort to blame his difficulties on other persons: Meiselman in the criminal case, Doctoroff in the motion for a new trial.

The Court's low opinion of the credibility of Mr. Mirkin is also due in some measure, although again, not in principal part, to the inconsistencies between his testimony and the testimony of the last witness, Mrs. Foresta.

(1) We turn first to the recusal issue.

Mirkin argues that, because the trial judge formed an adverse opinion as to his credibility during the trial, the judge became prejudiced against him and was, therefore, unable to hear and decide the new trial motion fairly and impartially. The judicial disqualification statute, 28 U.S.C. § 455 provides in pertinent part:

> § 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding (.)

Under the pertinent provisions of the statute, there are two grounds for disqualification: if the judge's impartiality might reasonably be

questioned, or if he has a personal bias or prejudice concerning a party. In ruling on a motion for disqualification brought under 28 U.S.C. § 144, [2./] which has the same "personal bias or prejudice" language as 28 U.S.C. § 455 (b)(1), the Supreme Court said (t)he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31 (41 S.Ct 230, 232, 65 L.Ed 481)."

2. 28 U.S.C. §144 provides in pertinent part: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

United States v. GrinnellCorp. 384 U.S. 563,583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). There is no claim here of prejudice stemming from an extrajudicial source, so our inquiry is limited to § 455 (a) whether the judge's impartiality might reasonably be questioned. 2./

We set forth the test for determining impartiality in United States v. Cowden, 545 F.2d 257 (1st Cir. 1976) cert. denied, 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977):

> The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. §455, but rather in the mind of the reasonable man.

Id. at 265. Making credibility assessments is daily grist for a trial judge. In any case or proceeding in which the defendant testifies, the judge, almost as a reflex process, will form

an opinion about the defendant's credibiiity. Such determination should not, of course be based on bias or prejudice, but prejudice does not inevitably arise as a result of forming a credibility opinion. A judge often must make a finding about the defendant's credibility in a pretrial suppression hearing, but, to our knowledge, no court has held that this, without more, disqualified him from presiding at the trial. See United States v. Archbold-Newhall, 554 F.2d 665, 681-682 (5th Cir.), cert. denied, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977). In United States v. Cepeda Penes, 577 F.2d 754, 756-58 (1st Cir. 1978), we found that the refusal of the trial judge to accept a plea of Nolo contendere unless he was satisfied that the defendant was guilty was not reasonable grounds for recusal. We have rebuffed challenges to a judge's impartiality grounded on rulings and findings made in prior proceedings involving the same parties. United States v. Parrilla, 601 F.2d 177 (1st Cir. 1980); Blizard v. Frechette 601 F.2d 1217 (1st Cir.

1979). Taken to its logical extreme, acceptance of defendant's contention would mean that in any motion for a new trial in which defendant's credibility was an issue and the judge had an opportunity to make a credibility assessment during the trial, the judge would have to recuse himself because he would be prejudiced one way or the other. We have be unable to find any case, and defendant has cited none, even remotely suggesting that this is or should be the law.

It is anomalous that the judge's frank comments here have been used for a claim of lack of impartiality. He could have decided the question of misconduct on the basis of the juror's testimony alone. Her testimony that she had no memory of the telephone call and did not know the defendant is believable, especially when her age, her physical condition, and the ten-year lapse of time between the divorce case and defendant's trial are taken into consideration. Defendant's testimony did not and could not contradict her testimony: the judge did not

have to choose between two conflicting statements. Although the judge's comments as to defendant's credibility might have been unnecessary, we think he is to be commended for putting on the record fully and completely the reasons for his ruling. "We expect candid findings and rulings from district judges." United States v. Parrilla Bonilla, 626 F.2d at 181.

We find nothing in the judge's comments or conduct of the hearing that would give rise to a doubt about his impartiality in the mind of a reasonable person. To the contrary, we think his conduct of the hearing and full statement of the reasons for his ruling bespeak only patience and fairness.

(2,3) The second issue, whether the district judge conducted a proper investigation of the claim of juror misconduct, is also devoid of merit. "A district court has broad, though not unlimited discretion to determine the nature and extent of its inquiry into allegations of jury bias." United States v.

Corbin, 590 F.2d 398, 400 (1st Cir. 1979). The first thing a judge has to do when faced with a claim of juror misconduct is to conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred." United States v. Doe, 513 F.2d at 711-12 (quoting United States v. McKinney, 429 F.2d 1019, 1026 (5th Cir. 1970).

Here, all the persons who could shed any light on the alleged juror misconduct were interrogated by the judge, and counsel were either invited to suggest questions or allowed to examine the witnesses directly. The questioning spanned a period of three days. Defendant asserts that this was not a full investigation because a voir dire of all the jurors was not conducted. This assumes that Mrs. Doctoroff lied in her testimony, did know the defendant, bore him ill will, and expressed her feelings to the other jurors - indeed the facts adduced at the hearing negated the need for such procedure. We find that the trial judge conducted a full and fair investigation of the juror mis-

conduct charge. There was certainly no abuse of discretion.

Finally, we cannot refrain from observing that the usual time for counsel and client to go over the list or jurors is before they are selected. Failure to do so here is inexplicable, especially given the caliber of defense counsel and the fact that defendant himself was an attorney. 3./

Affirmed.

3. We note for the record that Mr. Mirkin's attorney on this appeal did not serve as his trial counsel.

APPENDIX B

NEW ENGLAND REHABILITATION HOSPITAL

Feb. 02 '81

NEUROPSYCHOLOGICAL EVALUATION

December 20, 1980

MEISELMAN, Gerald
#00-64-70
OPD
D.O.B.: 4/16/37

Mr. Meiselman, a 43-year old divorced Caucasian male CPA (accountant) with a Master's Degree from Northeastern University (1969), was seen for a complete Psychological Evaluation as an outpatient at the New England Rehabilitation Hospital, Woburn, Ma. 01801 on September 9, 16, 23, and 30 and October 9, 16, and 24, 1980 in conjunction with a referral from Corinne H. Powell, Disability Benefit Counselor from Northwestern National Life Insurance Company, Minneapolis, Minnesota. The question proposed by the agent of referral in her letter of July 28, 1980 states, "We need to determine if Mr. Meiselman is employable in a job where he can be consistently employed over a reasonable time." Thus, psychological evaluation is applied to determine

the subject's present and premorbid levels of intellectual function, cognitive-cortical level and efficiency, memory and mental status, and to re-establish a baseline from which to assess change. Personality issues will be discussed as they relate to the patient's self-understanding and motivation to return to gainful employment. In addition to several clinical interviews, the following tests were administered:Sentence Completion(;)Figure Drawings (House,Tree,Person) (;) Wechler Memory Scale (Form I)(;) Rorchach Psychodiagnostics (;) Peabody Picture Vocabulary Test (;) Hooper Visual Organization Test (;) Thematic Apperception Test (;) Bender Visual Motor Gestalt Test (Expanded Version) (;) Wenchsler Adult Intelligence Scale (;) Controlled Word Association Test (;) and Other Short Tests of Recognition and Recall.

The medical chart at N.E.R.H. shows the following diagnoses: (1) Head injury with brain contusion secondary to an automobile accident on 11/28/75, (2) dislocation, right hip, with reduction with Kirschner wire, (3) open wound right

knee, with ? ? sepsis, improved,(4)splenectomy.

History, Hospital Course, Background:

The subject was initially seen at N.E.R.H. by the writer for Psychological Evaluation on 2/10/76, the subject was an inpatient who was wheelchair independent at this time. The findings of this evaluation noted a WAIS PSIQ of 93 (Low Average), A VIQ of 110 (Bright Normal) and a PIQ of 71 (Borderline) with diminished memory function at the low end of the Average range. Bihemispheric losses were clearly illustrated by his right-sided signs and constructional apraxia. The second evaluation of 10/5/77 showed a WAIS FSIQ of 93 (same as prior evaluation), a VIQ of 103 (Average) (a decrease of 7 Points), and a PIQ of 82 (Dull Normal) (an increase of 11 points). The second evaluation also demonstrated the subject's memory problems and other associated organic problems, as well as his difficulties in dealing with people. His return to gainful employment as an accountant too, at this time was seen as improbable.

Behavior During Testing, General Observations &

Subjective Impressions:

The subject is somewhat short, right-handed, seemingly well-developed, adequitely nourished individual with relatively long, receding, black graying hair who apparently had no physical, motor, perceptual, or sensory difficulties which could interfere with the normal administration of the testing. He was friendly and cooperative and seemed to adapt to the tasks of testing to the best of his abilities. He was talkative and quite verbal and seemed to want to spend time with the examiner; however, he did not acknowledge the need to seek professional help, i.e. psycho-therapy. Although he had been evaluated twice by this writer, he stated that he did not have any memory of these prior evaluations. (emphasis added) In discussing his role in relation to the insurance company, he stated that the insurance company does nothing for him, "it discontinued paying me," ....."They don't pay me a thing." He believes that he is quite capable of working and that he is currently seeking gainful employment. In dis-

cussing his job at Suffolk University, he noted that the full-time faculty people had choices of courses they wish to teach and further stated that Suffolk University wanted people with Doctorate's in Business Administration and CPA's with PhD's. In short the subject stated that he was denied a contract to teach at Suffolk because they gave first preference to full-time faculty. In discussing other jobs he had that he apparently did not notify the insurance company about, he stated that he worked for Landa & Altsher for two months during the springtime in 1980 and that he was hired only to work through their busy season. He denied being let go. He noted that he worked for a public accounting firm in Dorchester from 11/80 to 12/80 where he worked full time for two to three months and was let go here. He noted that he was told that he couldn't do the work up to standards that the company requested. He stated, " .... made careless mistakes," such as copying the numbers incorrectly from one place to another. The subject believes that he can still function as an

accountant and that he is overqualified to do any other kind of work than accounting. He also stated that he cannot tell potential employers that he was in an accident in which he sustained brain damage or they would not hire him. (emphasis added) He noted that before his automobile accident he had successfully taught at Northeastern for three years one night a week. He added that he taught at Stonehill part-time from 1966 to 1967 and was involved in working in industry from 1968 until such time in 1975 when he had his accident. He noted that he presently must borrow from his father to live and that his wife owns a house in which she both rents and lives with her boyfriend. He noted that he has been looking for teaching positions in junior colleges or community colleges; however, in a recent telephone conversation the subject noted that he was not hired. He also stated that he does not have a teaching certificate to teach in the public secondary schools, "I never took any teaching courses."

In conversation about the subject's lawyer,

the subject noted that he is not in touch with his lawyer and seems to be assuming a passive position in relation to his lawyer's letter to the insurance company, "I'm not familiar with insurance policies, I'm letting him do it." Again, to reiterate, the subject alleged that he has never talked with this lawyer who was hired by his father. He noted that he is more interested in finding a job than receiving funds from the insurance company and noted that he is not counting on the insurance company for money, "I feel I'm capable of doing something." In reference to not contacting the lawyer, he noted that he is not motivated to contact the lawyer and that he did not see what it would accomplish in meeting his long-term needs. The subject was also asked about why he did not notify the insurance company about his jobs and claimed that the only job the insurance company did not know about was the position with Landa and Altsher. He also stated that before doing work for H & R Block he worked a few other jobs which he claims the insurance company was appraised of.

He claimed that he was going to tell the insurance company about Landa and Altsher before his "next paycheck" and said that he had been gainfully employed by them for two weeks before being informed by the insurance company that he was followed by a detective.

The subject talked a great deal about his previous wife and two daughters, stating that he is not allowed to drive with his daughters because he ran a red light and was stopped by the local authorities. He noted that he was again stopped by a policeman for going 5 mph over the speed limit, but at this point was given only a verbal warning. He noted that his wife forbade him from driving with his daughters. He feels that the crime does not fit the punishment and still blames his wife for her unilateral decisions and for writing these prohibitions into the divorce settlement. He said that his wife makes it difficult to see his children.

In reviewing the records, it also seemed important to talk with Dr. Paradise, the subject's previous psychotherapist who treated the subject for over a year. There was mention by Sandra

Padow in her report that Dr. Paradise noted that the subject showed schizoid and sociopathic features. A phone call to Dr. Paradise revealed that the subject had not, in fact, called Dr. Paradise to release this information. The subject, was requested twice to call Dr. Paradise to allow him to speak with this evaluator. Previous to seeing Dr. Paradise, the subject was seen by a Diana Zacarian over a period of years for individual treatment. However, Diana Zacarian began to treat both the children and the wife which the subject resented; that is to say he believed that his treatment with her was individual and that her treating the children and his wife was a violation of their contract. He also stated that Diana Zacarian knew nothing about brain damage and felt that he was being used as a guinea pig in this way.

The subject was asked whether or not he would be willing to be vocationally assessed, and he noted that he does not need testing to determine his likes and dislikes. He does not believe that a vocational assessment would be needed if he gets a teaching job. He also did

not believe that psychotherapy would be of use to him at (t)his point.

From the results of the WAIS, the subject scores overall at the low end of the Average range of intellectual function (PSIQ --97), showing a significant 19-point discrepancy between his high Average (VIQ--106) verbal cognitive-ego functions and his high Dull Normal (PIQ--87) nonverbal or unverbalizable problem-solving abilities. Bihemispheric losses are clearly indicated to the degree that suggests a premorbid level of intellection a great deal higher in the Superior range. Presently he shows a strength in long-term memory from experience and general knowledge and in concentration and arithmetic reasoning. His concentration and arithmetic reasoning, in fact, are performed without error. He shows strength in word knowledge and verbal fluency, a finding which is corroborated by the Peabody Picture Vocabulary Test which assesses the subject's verbal intelligence through measuring his hearing vocabulary. The PPVT shows a score of 126+. He is slightly above the mean in

relationship and abstract thinking and in perceptomotor organization and spatial visualization ability. In contrast, he is slightly below the mean in visual memory and alertness to environmental details and shows a moderate deficit in relative practical knowledge and social judgment. He shows more pronounced deficits in his anticipation and planning, ability to size up a total complex social situation, and visual retention. He shows a pronounced deficit in fine psychomotor dexterity and is defective in attention and rote and immediate memory.

The subject's judgment is clearly interfered with (emphasis added), showing successes on more difficult items while missing easier items on one and the same subtest. His proverb interpretation is quite clearly decreased, and his ability to retain digits either forwards or backwards is quite striking. When time limitations are removed on visuopractic and constructional skills, the subject performs better--at the median Average level, increasing his WAIS PIQ from 87 to 99.

The subject's overall memory function is at

the low end of the Average range (MQ--92). He is essentially oriented to place and time with the exception of thinking that the date was one day earlier. He related personal and current information adequitely. His mental efficiency is intact but quite slowed. Thus, his abilities to calculate, to retain, to recall, and to maintain a sustained effort are still somewhat reduced. His complex verbal memory also indicates that he has difficulty in storing information. (emphasis added) Thus, when assessed with tasks for his immediate auditory memory for difficult material, he is not able to perform adequitely. His immediate visual memory for simple to moderately difficult gestalten exposed for a period of ten seconds is performed with noticeable errors. His overall learning ability, i.e. learning both easy and difficult word associations over three trials, is intact; however, he requires three trials to learn four of four difficult word associations. The Word Controlled Association Test was performed effectively, consistent with the subject's ability to use words. The Hooper Visual Organization

Test indicated the subject's moderate damage with right hemisphere functions, corroborating the results of the Wais PIQ. The Bender did not reveal any striking deficits.

The subject is quite clearly depressed using his obsessional features to adapt. He remains traumatized from his automobile accident. Quite clearly, the subject was an ambitious achievement-oriented person, but now he is unable to perform at this level. However his pride pushes him on. He has difficulty and will not acknowledge his disability. He shows tremendous cognitive losses or deficits and does not show a return of his functions lost from the automobile accident. Presently, he has lost approximately 30 IQ points. However, this loss is much greater when translated into adaptability. (emphasis added) His memory results seem artificially elevated (emphasis added) by his aotomatic ability to retain discrete facts. However, it is clear that he cannot reason clearly or integrate facts. (emphasis added) In view of his slowed down cognitive functioning, it seems that he probably cound not answer students' questions

effectively as it is very difficult for him to reason through questions. (emphasis added) Too, his ability to manipulate symbols has been quite clearly reduced. If he were hired to teach, he would do it through tremendous effort and motivation and exercise of will. He is battling against his cognitive disability which cannot get better.

The subject has become more self-centered and egocentric (emphasis added) over time, i.e. since his automobile accident. He is now concerned with his inability to be gainfully employed and has become embittered about this over time. The subject is persistent and tries hard and, clearly, he is truly slowed down and is not faking. As a result of this accident, his identity has become quite confusing to him and he has developed anger towards authority. (emphasis added) His damage to his head as a result of the automobile accident clearly reflects his sense of loss and underlying depression. His underlying depression is commensurate with his sense of loss. He has great difficulty in

integrating material, as clearly evidenced on the Rorschach. As a result of the accident and being unemployed, he is struggling against his orientation. He denies very strongly his need to be taken care of. (emphasis added) He is strongly defended against being passive or dependent. He tends to deny his disabilities and fallaciously insists that he can perform as well as a competent person. (emphasis added) He has a higher conception of himself than he is able to fulfill. He is, clearly, quite depressed and, although he tries to assert himself, he feels weak. He is quite worried about his intactness. Thus, he has a great potential for depression and denies his inabilities. He is currently forcing himself to work and to function as a maximally invested person and maintaining this perception of himself which, quite clearly, is contrary to demonstrable fact. He overestimates his ability and becomes manicky when he denies excessively. He is quite sad and frustrated about his inability to carry through which he feels will again afford him the opportunity

to become a man. He associates passivity and dependency with being a woman.

The subject shows a long, complex history over a period of many years. The subject was initially seen on February 19, 1976 and on October 5, 1977 for Psychological Evaluation. The current Evaluation shows a full-scale WAIS IQ of 97 (Average), indicating a marked 19-point discrepancy between his Average verbal-cognitive -ego functions (VIQ--106) and his Dull Normal nonverbal or unverbalizable problem-solving abilities (PIQ--87). Bihemispheric losses are indicated to the degree that suggests a premorbid level of intellectual function at the Superior range. Thus, there are losses of approximately 25 to 30 IQ points. Most of his losses are seen in constructional and visuopractic abilities. However, his judgment and attention and rote and immediate memory are quite poor. His overall memory function is at the low Average range--MQ--92. His mental efficiency is intact, but is quite slowed; for example, it required 24 second -sfor him to count by 3's from 1 to 40, indicat-

ing his slowed down abilities to calculate, to retain, to recall, and to maintain a sustained effort. Complex verbal memory is decreased, as to his immediate visual memory, especially when he must deal with two gestalten exposed simultaneously. Other test administrations show similar results in regard to the subject's memory and ability to learn. He is still quite traumatized from his automobile accident,(emphasis added)showing a sense of ambitious achievement. However he cannot do but his pride pushes him on. He will not acknowledge his disability. (emphasis added) He cannot reason clearly or integrate facts. (emphasis added) Quite clearly, he has become embittered over time; however he is persistent. He shows a great sense of loss and underlying depression which is commensurate with his sense of loss. He insists that he can perform as before, i.e. as a competent person, and, quite clearly, has a higher conception of himself than he is able to fulfill. (emphasis added)

In short, the subject shows a striking

potential for depression, is prone to deny his disabilities, and forces himself to continue his premorbid self-concept. He is invested in maintaining this premorbid perception of himself. Quite clearly, the subject is quite conflicted, and his prolonged absence from gainful employment or inability to get employment makes the situation for him worse. Clearly, the subject is no longer able to function as a CPA, and it is doubtful if he would be able to deal with academic involvement.

(Signed) _____

Herbert I. Rothfarb, PH.D.
Clinical Psychologist

HIR:mp
D: 1/17/81
T: 1/22/81

APPENDIX C

NEW ENGLAND REHABILITATION HOSPITAL

Accredited by Commission on Accreditation
Joint Commission on Accreditation of Hospitals

Member of International Association of Rehabilitation Facilities
Massachusetts Hospital Association

March 10, 1981

Attorney Gormley:

Mr. Gerald Meiselman was initially seen by me as an inpatient at the New England Rehabilitation Hospital for Neuropsychological Evaluation on 2/10/76 and a second time as an outpatient on 10/5/77. A third and recent outpatient Psychological Evaluation was also performed by the writer on 12/20/80 at the request of Northwestern National Life Insurance Company. The subject was treated at New England Rehabilitation Hospital Brain Injured Unit as a result of an auto-

mobile accident which occured on 12/28/75 in which the subject suffered a head injury with brain contusion.

The most recent formal test results continue to document Mr. Meiselman's bihemispheric losses, i.e., the subject shows cognitive-cortical losses in both sides of the brain. Most of the cognitive deficits are seen in his notably depressed inability to size up a total complex social situation, anticipation and planning and relative practical knowledge and social judgment. He continues to have memory problems which in contrast to his superior premorbid level are quite striking. He cannot reason clearly or interpret facts. With his current memory he would have difficulty performing adequitely at a high school level. (emphasis added) He is still quite psychologically traumatized from his automobile accident and shows a striking potential for depression. He presently tries to deny his disabilities (emphasis added) and has not yet emotionally realized his profound sense of loss or trauma. His inability to acknowledge

his intellectual losses due to his brain damage, deficiency in reasoning clearly and associated memory problems make him quite vulnerable to both internal and external stress. (emphasis added) His tolerance and lowered ability to withstand a legal deposition could cause this unfortunate man greater conflict and depression. In short, he has lost a great deal of his intelligence, memory (emphasis added) and sense of self which could only be worsened with additional conflict.

Thank you.

(Signature)
Herbert I. Rothfarb, Ph.D.
Chief, Psychology Department

HIR/sl

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